

82-1366
NO.

Office - Supreme Court, U.S.

FILED

FEB 14 1983

ALEXANDER L. STEVAS,
CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1982

PHILIP M. ADAMS,
Petitioner

versus

THE DEPARTMENT OF THE ARMY,
CORPS OF ENGINEERS,
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

WILLIAM M. PACE
Post Office Box 112
Aberdeen, Mississippi 39730
601/369-2310

Attorney for Petitioner

QUESTION PRESENTED

Whether a federal agency is bound to honor the terms of a "plea bargain" given to a career employee in return for cooperation in an internal personnel investigation; and

Whether the statement, set out below, amounts to a promise of qualified immunity when the employee relies on that statement and actively cooperates in the investigation:

j. That serious consideration be given to the exchange of "plea bargained" position of Mr. Adams in exchange for very detailed and specific facts and circumstances of each act of misuse of Government resources at Sardis. *This exchange would result in the retention of Mr. Adams in the Government workforce but the end result would be his hand would be severely slapped and it would be quite a while before he would ever be in a decision making position.*

(A U.S. Corps of Engineer district official admits reading to the petitioner the italicized words shown above.)

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Authorities	iii
Opinions Below	2
Grounds for Jurisdiction	2
Provisions, Statutes, or Regulations Involved	2
Statement of the Case	2
Argument	5
Conclusion	9
Certificate of Service	11
 Appendix	
Appendix A - U.S. Court of Appeals for the Federal Circuit decision No. 77-81, entered on November 16, 1982	A-1
Appendix B - Merit Systems Protection Board decision No. AT07528110689, October 15, 1981	B-1

TABLE OF AUTHORITIES

Cases:	Page
<i>Cooke v. Orser</i> , 12 M.J. 335 (CMA 1982)	8
<i>Olmstead v. United States</i> , 277 U.S. 438, 485, 48 S. Ct. 564, 575, 72 L.Ed. 944, 960 (1928)	7
<i>People v. Reagan</i> , 395 Mich. 306, 235 N.W.2d 581, 585 (1975)	7
<i>Santobello v. New York</i> , 404 U.S. 257, 30 L.Ed2d 427, 92 S.Ct. 495 (1971)	7
<i>State v. Davis</i> , Fla.App., 188 So.2d 24, 27 (1966)	8
<i>Workmen v. Commonwealth</i> , 580 S.W.2d 206 (Ky 1979)	8
Statutes:	
5 U.S.C. 7703(b)(1)	2
28 U.S.C. 1254(1)	2
Rules:	
Rule 17.1(c) Rules of the Supreme Court	2

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1982

No.

PHILIP M. ADAMS,
Petitioner

v.

THE DEPARTMENT OF THE ARMY,
CORPS OF ENGINEERS,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Petitioner prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Federal Circuit rendered November 16, 1982.

OPINIONS BELOW

The U. S. Court of Appeals for the Federal Circuit, in a decision dated November 16, 1982, affirmed the decision of the Merit Systems Protection Board (MSPB) (Appendix A). The MSPB affirmed the removal of petitioner from the service by decision dated October 15, 1981. (Appendix B).

GROUND'S FOR JURISDICTION

Petitioner seeks review by this court of the Federal Circuit decision pursuant to rule 17.1(c) of the Rules of the Supreme Court and 28 U.S.C. 1254(1). The original appeal was filed in the U. S. Court of Claims (later transferred to the U. S. Court of Appeals for the Federal Circuit) under 5 U.S.C. 7703(b)(1).

PROVISIONS, STATUTES, or REGULATIONS INVOLVED

Except for judicial jurisdiction, no federal statute is involved. The issue in this case is primarily concerned with an interpretation of the due process clause of the Fifth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

Petitioner Adams was assigned as assistant park manager at Sardis Lake near Sardis, Mississippi. Sardis is one of 7 flood control and recreational lakes in Arkansas and Mississippi maintained by

the U. S. Corps of Engineers and administered from the Corps' District Headquarters at Vicksburg, Mississippi.

The park manager was Robert Stanley Williams.

In February 1981, Lt. Col. Cooke from the Vicksburg Headquarters began an investigation at Sardis Lake. Col. Cooke was investigating some anonymous telephone calls that were alleged to have been received by Mr. Billy Joe Woods of the same Headquarters, concerning "wrongdoing" at the lake.

Col. Cooke questioned 19 government employees, and reported to Vicksburg that it would be necessary to secure the cooperation of some employee. Consequently, Col. Cooke recommended that a bargain be struck with Petitioner Adams to secure his cooperation. Paragraph 11 j. of his report, reveals that he recommended an agreement be made with Mr. Adams:

j. That serious consideration be given to the exchange of "plea bargained" position of Mr. Adams in exchange for very detailed and specific facts and circumstances of each act of misuse of Government resources at Sardis. This exchange would result in the retention of Mr. Adams in the Government workforce but the end result would be his hand would be severely slapped and it would be quite a while before he would ever be in a decision making position.

(The subject of the investigation was the park manager, Mr. Williams --- not Petitioner Adams. The Respondent denied that

there was any evidence of an agreement with Mr. Adams and refused to furnish a copy of Col. Cooke's report until required to do so by the MSPB hearing officer at the time of the hearing.)

On about March 5, 1981, Mr. Woods called Petitioner at Sardis Lake and told him about the agreement:

Mr. Woods read to me a portion of Col. Cooke's report from his first trip which pertained to myself. In it Col. Cooke recommended that I be let off with a slap on the hand in return for my full cooperation.

AR p. 312¹

After receiving this assurance from Mr. Woods, Petitioner Adams began to comply with his part of the agreement, and began keeping a small notebook in which he wrote anything he could think of pertaining to wrongdoing at the lake. AR p. 381

To further abide by the agreement, Mr. Adams urged all of the Corps employees to give statements, and all of them agreed to --- including Mr. Adams. On March 14 Mr. Adams gave a long and detailed statement to Col. Cooke alleging that he had seen certain minor incidences of "wrongdoing" at the park, and that he had not reported them.²

¹ Reference is to the Administrative Record, p. 312.

² Two examples are: seeing male employees working on a secretary's car that would not crank, and seeing a secretary typing a church bulletin while on official duty and using government equipment.

A Corps attorney advised the Vicksburg Headquarters that the charges against Mr. Adams were supported by "his own admission."

On April 9, 1981, Petitioner received a letter of proposed removal. He is again assured by the Vicksburg official, Mr. Woods, that the agreement would be honored. Later that month Mr. Harrison, another official at Vicksburg, assured Mr. Adams that the worst thing that could happen would be a transfer.

The Corps did not honor what the petitioner considered to be a leniency agreement, and issued a decision letter removing him from the service. After a hearing the MSPB affirmed the action of the Corps.

ARGUMENT

In the Federal Circuit the Corps argued that the petitioner never received an offer of immunity --- and that if he did, it was not judicially enforceable because: the petitioner did not follow the prescribed procedure outlined in the Organized Crime Control Act of 1970, and that the action against Petitioner was civil and not criminal and, therefore, "immunity" could not be granted.

(The Corps further argued that the employee did not prove that these officials had authority to give a pledge of immunity. The MSPB also felt that this was important:

"Appellant cites no authority, statutory, regulatory or

otherwise, which establishes that, in connection with an internal federal agency investigation, an agency can promise and grant immunity from disciplinary action to an employee involved in the investigation."

[Appendix B])

Prior to the hearing the Corps vigorously attempted to refuse to give a copy of Col. Cooke's report to the petitioner's attorney. It refused to comply with the hearing officer's order until the day of the hearing.

Although an interpretation of the facts is an issue, the basic facts are not in dispute. Corps officials admitted that they advised Petitioner of the "plea bargain" recommendation and they did not deny that they subsequently reinforced the "agreement" by encouraging the employee to cooperate with the investigating officer. One Vicksburg officer assured Mr. Adams, even after he had received the "proposal letter," that the most punishment he would receive would be a transfer.

Thus, the questions before the Supreme Court are: Did these actions by his superiors amount to a "plea bargain" and a "qualified immunity" promise, and if so, is this promise judicially enforceable in a "civil" action?

The question of whether a leniency agreement made to a government employee in a punitive type civil action is judicially enforceable, has apparently not been before the Supreme Court.

The courts have consistently required governments, both state and federal, to abide by the terms of a plea bargain in criminal cases. The judicially enforced terms are precisely the same as those that have been agreed upon --- no more and no less.

In *Santobello v. New York*, 404 U. S. 257, 30 L. Ed. 2d 427, 92 S.Ct. 495 (1971), the defendant was promised that if he would plead guilty to one count of the indictment, two counts would be dropped and the prosecuting attorney would not recommend the maximum sentence to the sentencing judge. Prior to sentencing, a new prosecutor was appointed who inadvertently recommended the maximum sentence. The Supreme Court said that "staff lawyers should let the left hand know what the right hand is doing" and that it made no difference that the breach of the agreement was inadvertent. The court remanded with an order to: allow defendant to be sentenced by a different judge or, in its discretion, withdraw his guilty plea to all counts.

The question is not whether the Commonwealth's bargain was wise or foolish. The question is whether the Commonwealth should be permitted to break its word.

The standards of the market place do not and should not govern the relationship between the government and a citizen. *People v. Reagan*, 395 Mich. 306, 235 N.W.2d 581, 585 (1975). "Our government is the potent, the omnipresent, teacher. For good or ill, it teaches the whole people by its example." *Olmstead v. United States*, 277 U. S. 438, 485, 48 S. Ct. 564, 575, 72 L.Ed.944, 960 (1928) (Brandeis, J., dissenting). If the government breaks its word, it breeds contempt for integrity and good faith. It destroys the confidence of citizens in the operation of their government and invites them to disregard

their obligations. That way lies anarchy. We deal here with a "pledge of public faith --- a promise made by state officials --- and one that should not be lightly disregarded." *State v. Davis*, Fla. App., 188 So.2d 24, 27 (1966).

Workmen v. Commonwealth, 580 S.W. 2d 206 (Ky. 1979).

A recent case (February 22, 1982) in the U. S. Court of Military Appeals thoroughly examined every issue presented by the case at hand. *Cooke v. Orser*, 12 M.J. 335 (CMA 1982). Lieutenant Cooke was charged with delivering highly sensitive and important documents to the Soviet Embassy. It was extremely vital for security reasons to determine what documents Cooke had compromised.

Consequently, the staff judge advocate allowed Air Force OSI agents to make certain assurances to Lt. Cooke that if he made a full disclosure he would not have to face a court martial. The accused continued to give detailed written accounts and thereafter passed a polygraph examination.

The staff judge advocate, aware of the possibility of the immunity pledge, made no effort to prevent its use and continued to accept the fruits of Cooke's cooperation. After Cooke's information was verified as true, the decision was made to prosecute him by court martial.

The Court of Military Appeals answered three questions:

1. Is it controlling that the Commanding General did not authorize an immunity agreement?

2. Did the defendant act to his detriment pursuant to the immunity agreement? and
3. What is the proper remedy?

The Court of Military Appeals held that Lieutenant Cooke's prosecution, after the immunity pledge, was a violation of due process, and the commanding general's silence did not legitimize the proceedings. 12 M.J. at p. 345.

In my earlier dissent in this case, I emphasized that, where, as here, the stakes are high, a suspect who has been asked for information --- and his lawyer --- must know that a promise of immunity which is given by a staff judge advocate possessing all the indicia of apparent authority and is reasonably relied on by the suspect will thereafter be judicially enforced. Otherwise, lips will remain sealed when it is vital to national security that they be unlocked. Although in this case an officer who may well have been a spy and traitor will escape military prosecution, it still is in the national interest that the promise of immunity be enforced. Likewise, it is in the national interest that the imperatives of due process, on which the principal opinion relies, be fully obeyed.

Accordingly, I join Judge Fletcher in granting the petition.

12 M.J. at p. 358

CONCLUSION

The investigative technique of offering leniency to a government employee for his assistance in a personnel matter is not an uncommon one. It is unusual, however, for a government agency to

renege on a promise --- or at least it has been up to this point.

The lesson taught agency managers by this case is: Make sure the employee understands that he will receive leniency and act accordingly, but *don't put it in writing and don't use the word "immunity."*

Congress could legislate a procedure for these matters that would be understood by managers and employees. Until it does, the courts must require the government to honor its word.

The Court is urged to hear this case and, for the first time, announce some protection for government employees who take the word of their superiors at face value.

Respectfully submitted,



WILLIAM M. PACE

Attorney for Petitioner

CERTIFICATE OF SERVICE

In compliance with the rules, I certify that I have this date served three copies of the above petition for writ of certiorari upon the Solicitor General of the United States, U. S. Department of Justice, Washington, D. C. 20530, by first class mail.

This the 10th day of February, 1983.

A handwritten signature in cursive script, appearing to read "William M. Pace", is written over a horizontal line.

WILLIAM M. PACE